No. 842

In the Supreme Court of the United States

OCTOBER TERM, 1945

COUNTY OF THURSTON IN THE STATE OF NEBRASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 352

COUNTY OF THURSTON IN THE STATE OF NEBRASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 79–97) is reported in 54 F. Supp. 201. The *per curiam* opinion of the Circuit Court of Appeals (R. 161–163) is reported in 149 F. 2d 485.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on May 22, 1945 (R. 163). The petition for a writ of certiorari was filed on August 21, 1945. The

065290—45

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Acts of Congress of June 20, 1936, and May 19, 1937, declaring certain Indian lands nontaxable, are constitutional as applied to lands in Nebraska.

2. Whether the lands involved are homesteads within the meaning of the Act of May 19, 1937.

3. Whether the United States may maintain an action to enjoin the taxation of Indian lands, and to recover taxes paid, without following state procedure.

STATUTES INVOLVED

The Act of June 20, 1936, 49 Stat. 1542, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $25,000, to be expended under such rules and regulations as the Secretary of the Interior may prescribe, for payment of taxes, including penalties and interest, assessed against individually owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the con-

sent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be nontaxable, and for redemption or reacquisition of any such land heretofore or hereafter sold for nonpayment of taxes.

SEC. 2. All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress.

The Act of May 19, 1937, 50 Stat. 188, provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of Public Law Numbered 716 of the Seventy-fourth Congress, being an Act entitled "An Act to relieve restricted Indians whose lands have been taxed or have been lost by failure to pay taxes, and for other purposes", is hereby amended to read as follows:

SEC. 2. All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared

to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided,* That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: *And provided further,* That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost $5,000, to be designated as a homestead.

STATEMENT

By the Act of June 20, 1936, *supra,* 49 Stat. 1542, Congress declared that all lands previously purchased out of trust or restricted funds of an Indian and held subject to restrictions against alienation except with the approval of the Secretary of the Interior are instrumentalities of the Federal Government, and nontaxable until otherwise directed. This Act was amended by the Act of May 19, 1937, *supra,* 50 Stat. 188, which limited the exemption to certain designated "homesteads." Despite these Acts of Congress, the County of Thurston assessed taxes for 1936 and subsequent years against lands purchased out of the restricted funds of Indians, held subject to restrictions against alienation, and designated as "homesteads" under the 1937 Act, the contention of the county

being that Congress had no authority to remove from the tax rolls lands privately owned and formerly subject to state taxation (R. 47–49, 102–104). The taxes were paid by the Indians under coercion and for the most part under protest (R. 102–104, 125), but in no case was there a strict compliance with the requirements of the law of Nebraska for the recovery of taxes alleged to be illegally assessed (R. 104–105).

The United States filed four complaints containing 22 counts, alleging that 22 tracts owned by individual Omaha and Winnebago Indians were tax-exempt by reason of the 1936 and 1937 Acts and praying for recovery of the taxes paid, an injunction against the collection of taxes assessed and the sale of the properties for delinquent taxes, the cancellation of the levy of the taxes, and an injunction against future assessments (R. 1–43). The County of Thurston and its officials connected with the assessment and collection of taxes were made parties defendants (R. 2, 12–13, 20, 28). With the agreement of all parties the four cases were consolidated for trial (R. 50), and the material facts were stipulated (R. 50–51, 101–119).

The district court wrote a lengthy opinion in which it analyzed all of the contentions urged (R. 79–97). It held that Congress had the power to exempt the restricted purchased lands of its wards from state taxation despite the fact that

the lands had at one time been patented in fee to whites and had been legally on the tax rolls (R. 82–89, 121). The court also concluded that all the lands were "homesteads" within the meaning of the 1937 Act and were exempt from taxation for 1937 and subsequent years although some of the parcels did not qualify as homesteads under Nebraska law (R. 94–95, 122–123). Judgments were entered granting relief substantially as prayed (R. 126–143). Upon appeal by petitioners the judgment was affirmed. A *per curiam* opinion expressed agreement with the trial court's decision upon each issue and with its reasoning (R. 162–163).

ARGUMENT

1. This Court's decision in *Board of Commr's* v. *Seber,* 318 U. S. 705 is conclusive that the 1936 and 1937 Acts are constitutional. The sources of the power of Congress are fully set forth in that opinion (pp. 715–719). See also *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, 602, 611. We submit that none of the authorities nor the arguments advanced by petitioners tend to indicate that this Court erred in sustaining the power of Congress to exempt Indian lands from local taxation nor do they suggest any valid reason why this Court's decision in the *Seber* case should be reexamined. As this Court pointed out in the *Seber* case (p. 718), contentions based upon the alleged financial embarrassment to local gov-

ernmental units should be addressed to Congress, not the courts. The fact that the Nebraska Enabling Act does not, like that of Oklahoma, specifically reserve the rights of the Federal Government to legislate for the Indians does not alter the results (cf. Pet. 22–23, 47). As the district court pointed out (R. 84), this Court's decision in the *Seber* case did not rest upon the provisions of the Oklahoma Enabling Act but rather upon the authority of the Federal Government in Indian Affairs. Moreover, the Enabling Act could not have provided a source of power to deny to Oklahoma rights enjoyed immutably by other states. *Coyle* v. *Oklahoma,* 221 U. S. 559, 566–574; *Ex parte Webb,* 225 U. S. 663, 690–691.

2. This Court's decision in the *Seber* case likewise disposes of the contention (Pet. 53–62) that the lands in question were not homesteads. In the 1937 Act Congress indicated that by a "homestead" it meant land (a) purchased before May 19, 1937, out of the trust or restricted funds of individual Indians; (b) held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; (c) selected for designation as a homestead by its Indian owner or owners with the approval of the Secretary; and (d) containing not more than a total of 160 acres, if agricultural land, and not ex-

ceeding $5,000.00 in cost, if urban property. It is agreed that all the lands whose status as "homesteads" is questioned meet these four requirements (R. 9, 23, 28–31, 32–33, 35, 40–41, 102–104), and this has been held sufficient to invoke the exemption granted by the 1937 Act. *Board of Comm'rs* v. *Seber,* 318 U. S. 705, 712.

As the district court pointed out (R. 94–95), the term "homestead" is variously defined in Nebraska law for various purposes. Plainly, Congress rather than adopting the varying definitions under local law, established in the 1937 Act its own definition of "homestead" under which four conditions must be met. *Muskogee County* v. *United States,* 133 F. 2d 61, 64 (C. C. A. 10). There is nothing unusual in use of the term "homestead" for purposes of classification of Indian lands. Cf. *Sperry Oil Co.* v. *Chisholm,* 264 U. S. 488. Since Congress specifically set forth the conditions under which the tax exemption could be obtained, additional conditions may not be read into the statute requiring conformance to the various local definitions of "homesteads".

3. Petitioners assert (Pet. 62–75) that it was compulsory that the local procedure for the recovery of illegal taxes be followed. The trial court found that the taxes were collected coercively (R. 122) and formal protest was made in most instances (R. 104–105). Since the taxes were paid

involuntarily, the United States, in order to fulfil its duty of protecting its Indian wards, was authorized to maintain these actions on behalf of its wards without first meeting the procedural requirements of the Nebraska law. *Board of Comm'rs* v. *United States,* 308 U. S. 343, 350–351; *United States* v. *Dewey County,* 14 F. 2d 784, 791 (D. S. D.) affirmed 26 F. 2d 434 (C. C. A. 8); *United States* v. *Nez Perce County, Idaho,* 95 F. 2d 232, 236 (C. C. A. 9); *Muskogee County* v. *United States,* 133 F. 2d 61, 63 (C. C. A. 10). While contending for a contrary result, petitioners make no attempt to show that these decisions are erroneous.[1] *Great Lakes Co.* v. *Huffman,* 319 U. S. 293, relied upon by petitioners (Pet. 69–72), involved only private parties, and petitioners' argument is that the Indians should be subject to the same restrictions as other citizens of Nebraska. But an entirely different question arises when, as here, the action is brought by the United States pursuant to its obligation to protect its Indian wards. Even if the individual Indian might be bound by such local restrictions, these do not bind

[1] Even under State law an injunctive suit is proper without regard to the usual procedural requirements when, as here, the tax complained of is levied upon tax-exempt property. *East Lincoln Lodge No. 210, A. F. & A. M.* v. *Lincoln* 131 Neb. 379, 380–385. Moreover, the fact that the taxes had been distributed to other governmental agencies, not made parties to the suit (cf. Pet. 73–75), is immaterial. *McDonald* v. *Lincoln County,* 121 Neb. 741, 750–751).

the United States in executing its governmental duties, as the above-cited cases demonstrate.

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

HAROLD JUDSON,
Acting Solicitor General.
J. EDWARD WILLIAMS,
Acting Head, Lands Division.
ROGER P. MARQUIS,
Attorney.

SEPTEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945